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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

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| IN RE WELLS FARGO MORTGAGE-BACKED CERTIFICATES LITIGATION | Civil Action No. 09-cv-01376-SI<br><br>CONSOLIDATED CLASS ACTION<br>ECF<br><br>PLAINTIFFS' OPPOSITION TO: (1) THE WELLS FARGO DEFENDANTS' AND INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT; AND (2) THE UNDERWRITER DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT |

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New Orleans Employees' Retirement System, Louisiana Sheriffs' Pension & Relief Fund, Government of Guam Retirement Fund, and Alameda County Employees' Retirement Association (collectively, "Lead Plaintiffs") and additional plaintiffs the Vermont Pension Investment Committee, the Public Employees' Retirement System of Mississippi, the Policemen's Annuity & Benefit Fund of the City of Chicago, the Southeastern Pennsylvania Transportation Authority and the Plumbers & Steamfitters Local 60 Pension Plan ("Additional Plaintiffs," together with Lead Plaintiffs, "Plaintiffs") submit this Memorandum of Law in Opposition to the separate motions to dismiss by: (1) the Wells Fargo Defendants and the Individual Defendants ("Wells Mot.") (Dkt. No. 214); and (2) the Underwriter Defendants ("Underwriter Mot.") (Dkt. No. 212).

## I. INTRODUCTION

This is a securities class action involving the sale of over $36 billion in mortgage pass-through certificates (the "Certificates") issued pursuant to offering documents that contained untrue statements and omitted material facts.[1] The Amended Complaint asserts claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act") against Wells Fargo Bank, N.A. ("Wells Fargo Bank"), Wells Fargo Asset Securities Corporation (the "Depositor"), the Underwriter Defendants, and the Individual Defendants.[2]

When granting in part and denying in part Defendants' prior motions to dismiss, the Court sustained Plaintiffs' allegations of untrue statements and omissions in the Offering Documents related to underwriting standards, ratings and appraisals. *In re Wells Fargo Mortgage Backed Certificates Litig.*, 2010 U.S. Dist. LEXIS 39825 (N.D. Cal. Apr. 22, 2010) ("April 22 Order"). Dkt. No. 198. The Court rejected Defendants' statute of limitations defense as "unpersuasive," and sustained Plaintiffs'

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[1] ¶1. "¶_" refers to paragraph(s) in the Amended Consolidated Class Action Complaint For Violations Of §§ 11, 12(a)(2) And 15 Of The Securities Act of 1933 (the "Amended Complaint"). Dkt. No. 203.

[2] "Underwriter Defendants" refers to Bear, Stearns & Co. Inc., Goldman, Sachs & Co., Deutsche Bank Securities, Inc., UBS Securities, LLC, Credit Suisse Securities (USA), LLC, RBS Securities, Inc., Citigroup Global Markets, Inc., Banc of America Securities, LLC, and Merrill Lynch, Pierce, Fenner & Smith, Inc. "Individual Defendants" refers to David Moskowitz, Franklin Codel, Douglas K. Johnson, and Thomas Neary. "Wells Fargo Defendants" refers collectively to Wells Fargo Bank, N.A., Wells Fargo Asset Securities Corp., and the Individual Defendants.

Section 15 claims against the Wells Fargo Defendants. *Id.* at *23-24, *44-45. The Court also granted Plaintiffs leave to amend to: (1) "designate additional named plaintiffs who purchased securities through those offerings"; and (2) "allege facts properly giving rise to standing." *Id.* at *20, 22.

Plaintiffs amended their claims in accordance with the April 22 Order. The Amended Complaint re-alleges the sustained claims and omits the dismissed claims. It also adds the Additional Plaintiffs, who purchased in ten offerings which the Lead Plaintiffs did not, and alleges facts giving rise to standing for Plaintiffs' Section 12(a)(2) claims. The Underwriter Defendants contend that the claims asserted by the Additional Plaintiffs are time-barred. Underwriter Mot. at 5-6. This argument is devoid of merit. Under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), the filing of a class action suspends the applicable statute of limitations and repose for all putative class members. Here, the initial complaint identifying claims now asserted in the Amended Complaint was filed on March 27, 2009. Accordingly, under *American Pipe*, the applicable statute of limitations and repose for the claims of all putative class members, including the Additional Plaintiffs, was suspended, and the claims are timely.

Defendants further contend that Plaintiffs' Section 12 claims should be dismissed because the Amended Complaint does not include by rote the phrase "in the initial offering." The Amended Complaint, however, alleges facts giving rise to standing, including the dates the Certificates were offered, the date the Plaintiffs purchased the Certificates, and that Plaintiffs acquired each security directly from an Underwriter Defendant. Nothing more is required. *See Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1081 (9th Cir. 1999) (finding that plaintiffs must have "purchased the security directly from the issuer of the prospectus").

Separate and apart from challenging the Additional Plaintiffs' claims and the Section 12 claims, Defendants again move to dismiss the sustained claims. In so doing, they largely recycle arguments that this Court previously considered and rejected, or they attempt to raise fallback arguments that could have been, but were not, raised in their prior motions. Defendants contend, as they did before, that ratings misstatements are "opinions," despite the Court's holding that Plaintiffs' allegations are "sufficient to establish an actionable misstatement with respect to the rating process."

April 22 Order, 2010 U.S. Dist. LEXIS 39825, at *43. Further, Defendants again attempt to argue that the claims in the Amended Complaint are untimely as a matter of law. As this Court correctly found, however, the statute of limitations defense is fact-intensive and is generally not appropriate for consideration at the pleading stage. Moreover, no sufficient suspicion of a Securities Act claim reasonably existed prior to May 20, 2008, when the Certificates that were initially rated "A" or higher were first downgraded below investment-grade. The initial action here was timely filed on March 27, 2009 – well within one year of the May 20, 2008 downgrades.

The Wells Fargo Defendants' motion is really a disguised motion for reconsideration that fails to meet the requirements of Civil Local Rule 7-9. Under that rule, no party may file a motion for reconsideration "without first obtaining leave of Court." The Rule states that leave can only be granted if a party cites "a material difference in fact or law" or a "manifest failure by the Court to consider material facts or dispositive legal arguments." It further states that requests for leave are prohibited from repeating "any oral or written argument made by the applying party" and that "[a]ny party who violates this restriction shall be subject to appropriate sanctions." Defendants do not – because they cannot – cite any material difference in law or fact nor a manifest failure to consider material facts that would make re-challenging any of Plaintiffs' allegations appropriate.

In short, the Amended Complaint states claims for Defendants' violations of the Securities Act, complies with this Court's Order and precedent from the Supreme Court and the Ninth Circuit. Defendants' motions should be denied in their entirety, and they should be ordered to answer the Amended Complaint within 20 days.

## II. SUMMARY OF THE ACTION

Wells Fargo Bank, acting in coordination with the Underwriter Defendants and the rating agencies, sold over $36 billion of Certificates to investors in 27 different trusts pursuant to the Offering Documents. ¶¶3, 43. The Certificates were sold primarily to institutional investors, such as Plaintiffs here, who purchased the Certificates as purportedly safe, investment-grade securities. ¶50. The Offering Documents contained untrue statements of material fact, or omitted to state material facts necessary to make the statements therein not misleading, regarding: (1) the underwriting

standards purportedly used in connection with the origination of the underlying mortgages; (2) the maximum loan-to-value ratios used to qualify borrowers; (3) the appraisals of the properties underlying the mortgages; and (4) the ratings of the Certificates. ¶¶5, 116.

The true facts which were omitted from the Offering Documents were:

- Wells Fargo Bank, its affiliates, and the additional originators had not followed the stated underwriting standards when issuing loans to borrowers;
- The underlying mortgages were based on appraisals that overstated the value of the underlying properties; and
- The credit ratings were based on outdated assumptions, relaxed ratings criteria, and inaccurate loan information.

¶6.

As a result, Plaintiffs and the Class purchased Certificates that were far riskier than represented, were not of the "best quality," or even "medium credit quality," and were not equivalent to other investments with the same credit ratings. ¶¶4, 7, 40. Virtually all of the Certificates have now been downgraded below investment-grade. ¶118.

Traditionally, loan originators had financial incentive to use prudent underwriting practice to ensure that the borrower had the ability to repay the note and that the underlying property was sufficiently valuable to serve as collateral. ¶68. With the proliferation of securitizations, however, this model gave way to the "originate to distribute" model. ¶69. Under the new model, loans were pooled together, securitized and sold to investors in the form of mortgage-backed securities. Securitization meant that the originators were no longer required to hold the loans they issued to maturity, and the credit risk was instead transferred to investors. *Id.* Loan fees and sales revenue became the originator's primary profit mechanism, making the sheer quantity of loans more important than the quality of the loans.

This model was highly lucrative for banks, including Wells Fargo Bank. Wells Fargo Bank established a subsidiary, the Depositor, whose sole purpose was to securitize loans. ¶¶21-22, 71. To complete the sale of the loans (and to transfer the risk), the Depositor needed to brand its Certificates with the highest investment-grade ratings from rating agencies. The ratings assigned to the Certificates purportedly addressed the "likelihood of the receipt by certificateholders of all

distributions of principal and interest to which such certificateholders are entitled." ¶¶100-01. The ratings also supposedly addressed "the structural, legal and issuer aspects associated with the certificates, including the nature of the underlying mortgage loans and the credit quality of the credit support provider, if any." *Id.* The Offering Documents failed to disclose that the rating agencies used outdated and unreliable models when rating the Certificates. ¶¶6, 110, 112-14. Further, as the result of the systemic violations of the underwriting standards, the ratings were based on "inaccurate loan information" related to borrower credit-worthiness, ability to repay, and the sufficiency of the collateral. ¶¶6, 67, 72-81, 83-85. Accordingly, the Certificates' ratings were unjustifiably high, and the statements in the Offering Documents about the ratings and the ratings process were untrue and omitted material facts. ¶¶4, 105.

The rating agencies maintained investment-grade ratings on all Certificates initially rated "A" and higher until May 20, 2008. ¶104. They maintained investment-grade ratings on all Certificates initially rated "AAA" until December 16, 2008. *Id.* The ratings on virtually all of the Certificates have since been downgraded. ¶¶7, 118. The Certificates, therefore, are no longer marketable near the prices paid by Plaintiffs and the Class. ¶7.

## III. ARGUMENT

### A. Plaintiffs Amended Their Claims In Accordance With The Court's Order

The April 22 Order sustained Plaintiffs' Section 11 claims against the Wells Fargo Defendants and the Underwriter Defendants related to each of the alleged untrue statements and omissions in offerings in which Lead Plaintiffs purchased Certificates. As to underwriting misstatements, the Court stated that "the Offering Documents were misleading as to the ***extent*** to which Wells Fargo and the third-party originators deviated from their guidelines." 2010 U.S. Dist. LEXIS 39825, at *38 (emphasis in original). As to the ratings misstatements, the Court found that "statements by executives of Moody's and Standard and Poor's in which the executive admitted that they were aware at the time the subject ratings were made that the agencies' rating models were outdated . . . are sufficient to establish an actionable misstatement with respect to the rating process." *Id.* at *43. As to

the appraisal/loan-to-value misstatements, the Court found that Plaintiffs allegations that "Wells Fargo's practices permitted the pervasive and systematic use of inflated appraisals, affecting all types of mortgages," were sufficient to state a claim. *Id.* at *40-41.

The Court dismissed without prejudice claims arising from Certificates that the Lead Plaintiffs had not purchased, as well as the Section 12(a)(2) claims. In so doing, the Court granted Plaintiffs leave to amend to: (1) "designate additional named plaintiffs who purchased securities through those offerings"; and (2) "allege facts properly giving rise to standing." *Id.* at *20, 22.

Plaintiffs amended their complaint in accordance with the Court's instructions. Plaintiffs designated the five Additional Plaintiffs who purchased securities in ten offerings that the Lead Plaintiffs did not purchase. In addition, rather than merely allege that Plaintiffs purchased "pursuant or traceable" to the Offering Documents for purposes of Section 12, the Amended Complaint alleges that Plaintiffs purchased directly from the Underwriter Defendants. Fed. R. Civ. P. 8 requires nothing more in order for Plaintiffs to state actionable claims.

1. Under *American Pipe*, The Class Action Complaint Tolled The Statute Of Limitations For The Additional Plaintiffs

The Underwriter Defendants attempt to argue that the claims of the Additional Plaintiffs are untimely. They are wrong. In *American Pipe*, the Supreme Court held that the filing of a class action suspends the applicable statute of limitations and repose for all putative class members until a decision on class certification is issued. 414 U.S. at 554; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-50 (1983) ("The filing of a class action tolls the statute of limitations 'as to all asserted members of the class'"). The Supreme Court explained that, were the rule otherwise, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable" which would defeat the "efficiency and economy of litigation" normally associated with Rule 23 class actions. *Id.* at 553.

Here, the initial complaint was filed on March 27, 2009, and asserted the claims of the Additional Plaintiffs. Accordingly, under *American Pipe*, the applicable statute of limitations and repose for all claims of all putative class members, including the Additional Plaintiffs, was suspended

as of March 27, 2009.[3] In its April 22, Order, the Court specifically afforded leave to amend to "designate additional named plaintiffs who purchased securities through those offerings." *Id.* at *20.

The Underwriter Defendants incorrectly contend that because the Lead Plaintiffs lacked standing to assert claims on behalf of purchasers in the ten additional offerings those claims are now time-barred. Underwriter Mot. at 6. As the court in *In re Flag Telecom Holdings, Ltd. Sec. Litig.* explained: "[T]he failure to apply the *American Pipe* rule to cases where a class action complaint was dismissed for lack of standing undermines the policies underlying Rule 23 and is inconsistent with the Court's reasoning in *American Pipe*." 352 F. Supp. 2d 429, 455 (S.D.N.Y. 2005).

In *Flag Telecom*, the court dismissed the plaintiffs' Section 12(a)(2) claims because "none of the named plaintiffs purchased shares of Flag in the company's IPO." *Id*. at 454. Plaintiffs filed an amended complaint naming an additional plaintiff who purchased in the IPO. *Id*. The court rejected the same argument the Underwriter Defendants raise here:

> Failure to apply the *American Pipe* rule would undermine the policies of "efficiency and economy of litigation" which underlie Rule 23. . . . Rule 23 and the PSLRA tend to encourage investors who might otherwise bring lawsuits to refrain from filing a complaint or intervening in an action when those investors feel their interests are adequately protected in a proposed class action that has already been filed. Indeed, an investor such as [the new plaintiff] would probably have concluded that he had little chance of becoming lead plaintiff after Loftin, who appears to have invested a substantial amount of capital in Flag, filed his May 2002 Complaint. ***[The new plaintiff] should not be punished simply because he failed to anticipate that plaintiff's § 12(a)(2) claims would be dismissed because none of the named plaintiffs in the action had standing to sue on those claims.***

*Id*. at 456.

Numerous other courts are in accord. *See Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007) (suggesting that appellants could have filed a successor class action where "the appropriateness of a class action was

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[3] "Because the complaint itself is the ultimate determinant of the putative class," Defendants were on notice that the putative class clearly included the ten offerings which the Additional Plaintiffs purchased. *In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.*, 2002 WL 31132906, at *3 (S.D.N.Y. Sept. 25, 2002) (holding that statute of limitations was tolled under *American Pipe* where the same underwriters were named as defendants in an earlier class action in which class certification had not yet been decided).

never examined [and] instead the case was voluntarily dismissed before the class was certified"); *Schur v. Friedman & Shaftan, P.C.*, 123 F.R.D. 611, 613 (N.D. Cal. 1988) (denying motion to dismiss because prior class action filing tolled statute of limitations); *In re Enron Corp. Sec. Deriv. & ERISA Litig.*, 529 F. Supp. 2d 644, 709 (S.D. Tex. 2006) (Securities Act claims of a newly added plaintiff were tolled under *American Pipe*); *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 2002 WL 33934282, at *27-30 (D.N.J. June 26, 2002) (finding that limitations period was tolled upon filing of original class action complaint which allowed proper class representatives to be substituted for standing purposes); *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 n.9 (S.D.N.Y. 2002) (holding that the filing of the lead plaintiff's action tolled the § 12(a)(2) claims). *See also McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 384-89 (3d Cir. 2002) (tolling claims and permitting intervention of a class representative with standing).

Defendants rely heavily on *Korwek v. Hunt*, 827 F. 2d 874, 876-77 (2d Cir. 1987). In *Korwek*, however, plaintiffs re-filed their case after class certification was denied. *Id.* Indeed, *Korwek* "stands only for the proposition that once class certification is denied, putative class members may not rely on the *American Pipe* rule to commence a new, substantially identical class action because this would allow the putative class members to 'argue and reargue the question of class certification by filing new but repetitive complaints.'" *Flag Telecom*, 352 F. Supp. 2d at 455 n.20. The court in *In re IndyMac Mortgage-Backed Sec. Litig.*, 2010 WL 2473243, at *4 (S.D.N.Y. June 21, 2010) ("IndyMac MBS") recently rejected this exact argument and reliance on *Korwek*, finding that *American Pipe* tolling applied because where there is no definitive determination on class certification: "[t]he concerns about repose, inefficiency, and wasteful litigation expressed in *Korwek* … are inapposite." Here, for these same reasons – and especially where this Court explicitly granted leave to name additional plaintiffs – *American Pipe* tolling applies and the Additional Plaintiffs' claims are timely.[4]

[4] *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), and *Palmer v. Stassinos*, 236 F.R.D. 460 (N.D. Cal. 2006), which Defendants cite, are likewise inapposite as the courts' decisions to deny tolling in both cases were made after the determination of class certification. Defendants also rely on *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990), where the court applied the rule in *Korwek* to a class action brought after a previous class action was dismissed for lack of standing. This case, however, was decided prior to the passage of the PSLRA and extension of *Korwek* in this manner has been criticized by other courts. *See, e.g.*, *Flag Telecom*, 352 F. Supp. 2d at 455 n.20;

Defendants' reliance on *Pub. Employees' Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc.*, 2010 WL 2175875, at *2 (S.D.N.Y. June 1, 2010) ("Merrill MBS") is misplaced because this timing issue was never before the Court. The undersigned Lead Counsel in this action is also Lead Counsel in the *Merrill MBS* action and is very familiar with the issues and arguments asserted in that case. The court there was never presented with, and did not rule on, the application of *American Pipe*. Indeed, the issue simply was never raised because no additional plaintiff sought to bring claims.[5]

Finally, because the Additional Plaintiffs' claims were tolled, Defendants' relation back argument is a red herring. Underwriter Mot. at 8. The Amended Complaint asserts the same claims on behalf of "all persons or entities who purchased or otherwise acquired mortgage pass-through Certificates … pursuant or traceable to" the exact registration statements and offerings identified in the original complaint. Defendants were on notice of the Additional Plaintiffs' claims when the action was timely filed on March 27, 2009. Accordingly, Defendants' relation back analysis is irrelevant.[6]

2. The Amended Complaint States Claims Under Section 12(a)(2)

Section 12 extends liability to any person who "offers or sells a security … by means of a prospectus … which includes an untrue statement of a material fact …." 15 U.S.C. § 77R. The Ninth Circuit has found that because Section 12 contains the language "the person purchasing such security ***from him***," plaintiffs must have "purchased the security directly from the issuer of the prospectus." *Hertzberg*, 191 F.3d at 1081 (emphasis in original). Defendants contend that Plaintiffs have failed to

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*Chubb Corp.*, 2002 WL 33934282, at *30 (failure to apply *American Pipe* would undermine the efficiency and economy of litigation which underlies Rule 23 and the PSLRA).

[5] Defendants' other cases are also easily distinguished. For example, *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018 (9th Cir. 2003), is not a securities class action subject to the PSLRA and does not consider or discuss *American Pipe* tolling. Additionally, *Lierboe* was dismissed after the district court decided class certification, and the court never granted leave to amend to name additional plaintiffs. Similarly, *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), is a non-securities case that was previously certified as a class and is, therefore, factually inapposite.

[6] Defendants' relation back cases are factually distinguishable. *See In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 925 (9th Cir. 1996) (the statute of limitations barred "extending the class period"); *Howard v. Hui*, 2001 U.S. Dist. LEXIS 15443, at *19-20 (N.D. Cal. Sept. 24, 2001) (the statute of limitations barred adding new insider trading claims never asserted in the original action). Unlike the Amended Complaint here, both *Syntex* and *Howard* added new claims that were never previously asserted.

properly plead a valid Section 12 claim because the Amended Complaint does not include by rote the phrase "in the initial offering." *See* Wells Mot. at 5-6. Defendants are wrong.

Nothing in the statutory language or *Hertzberg* requires plaintiffs to purchase "in the initial offering" in order to have standing to assert Section 12(a)(2) claims. Rather, Plaintiffs need only to allege they purchased the security directly from the issuer of the prospectus. *Id.* at 1081. Here, the Amended Complaint clearly complies with this standard, alleging: (1) that the Underwriter Defendants were engaged to sell the Certificates, ¶41, (2) the Underwriter Defendant who sold each security to each Plaintiff, ¶¶15, 23-31, 43, 56; (3) the date the Plaintiff purchased the security, *id.*; (4) the prospectus supplement date for each security, *id.*; (5) that Plaintiffs acquired the security "directly" from the Underwriter Defendant, *id.*; and (6) that Plaintiffs purchased "pursuant to" rather than "traceable to" the offerings at issue, ¶¶137-45. Moreover, even if Plaintiffs were required to plead that they purchased in the initial offering, the prospectus supplement dates and the purchase dates make clear which purchases were either in the initial offering, or directly from the Underwriter Defendant soon thereafter, rather than in the secondary market.

Defendants' cases do not support their position. For example, in *Hertzberg*, the court found that anyone who purchased stock under the registration statement at issue could assert a Section 11 cause of action, regardless of when the purchase was made. 191 F.3d at 1081. Indeed, *Hertzberg* says nothing requiring Section 12(a)(2) plaintiffs to have purchased "in the initial offering." Likewise, in *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 981 (N.D. Cal. 2007), the plaintiffs argued – unlike here – that Section 12(a)(2) liability should be extended to aftermarket purchasers who purchased "traceable to" an offering. In fact, Plaintiffs specifically eliminated the "traceable to" language from the Section 12(a)(2) count section in the Amended Complaint. Finally, Defendants rely on *IndyMac MBS*, where the court ***upheld*** allegations similar to those in the Amended Complaint. 2010 WL 2473243, at *3 (finding Section 12(a)(2) allegations sufficient where plaintiffs alleged that (1) they purchased "pursuant to" the relevant Offering Documents; (2) they purchased a specified number of Certificates on specified dates (some of which corresponded to the initial offering dates) at

specified prices; (3) specific Underwriter Defendants were associated with each individual offering; and (4) the Underwriter Defendants "promoted and sold" the Certificates for their own personal gain).

Plaintiffs' Section 12(a)(2) allegations comply with the requirements of the Court's April 22 Order, the Securities Act, Ninth Circuit law and Fed. R. Civ. P. 8. Defendants' motions to dismiss these claims should be denied.

### 3. Plaintiffs And The Class Suffered Economic Loss For Purchases Of WFMBS 2006-AR16 And WFMBS 2007-13 Certificates

Defendants challenge Plaintiffs' standing to represent purchasers of two Certificates on the grounds that Plaintiffs have not adequately pled an economic loss. Wells Mot. at 11-12. With respect to MissPERS, Defendants do not – and cannot – challenge MissPERS' standing for the WFMBS 2007-AR4, WFMBS 2007-10, WFMBS 2006-3, WFMBS 2006-6, WFMBS 2006-AR10, WFMBS 2006-AR11, WFMBS 2006-AR17 and WFMBS 2006-AR2 offerings. ¶118. Likewise, Defendants do not dispute that MissPERS suffered a net loss on its purchases of Certificates at issue in this litigation. Rather, Defendants isolate the Wells Fargo Mortgage Backed Securities 2006-AR16 Trust ("WFMBS 2006-AR16") and attempt to challenge MissPERS' ability to represent investors on the grounds that MissPERS purportedly realized a nominal gain.[7] In truth, however, MissPERS sold part of its WFMBS 2006-AR16 Certificates ($1,410,000 in face value) at a loss. It is well established that determination of damages is a question of fact not appropriate for resolution on the motion to dismiss. *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 351 n.80 (S.D.N.Y. 2003) ("The determination of value [in a Section 11 case] is a fact-intensive inquiry."). The fact that one investor has different damages calculations from other Class members does not prevent it from serving as a Class representative. *See, e.g., Tsirekidze v. Syntax-Brillian Corp.*, 2009 WL 2151838, at *4 (D. Ariz. July 17, 2009) ("[D]ifferences in the amount of damages, the size or manner of [stock] purchaser, the nature of the purchaser, and even the specific document influencing the purchase will not render a claim atypical in most securities cases") (internal citations omitted). The WFMBS 2006-AR16

[7] Contrary to Defendants' contention, MissPERS purchased its Certificates at a total price of $5,084,854.50 and sold at a total price of $5,089,068, a difference of $4,213.50, not $421,350.

Certificates were originally rated Aaa and AAA by Moody's and Fitch, respectively, but have since been severely downgraded, and are currently rated Caa2 and CCC. ¶118. The WFMBS 2006-AR16 Certificates are no longer marketable near the prices paid by MissPERS and the Class. ¶7.

Defendants next argue that SEPTA's claims related to the Wells Fargo Mortgage Backed Securities 2007-13 Trust ("WFMBS 2007-13") should be dismissed for failure to plead an economic loss. Wells Mot. at 12. This argument is premised on a faulty reading of SEPTA's Certification. SEPTA's Certification includes a column titled "Shares," which lists the ***face value*** of SEPTA's purchases in WFMBS 2007-13. Defendants mistakenly assert that this column indicates a purchase or sale price, which leads them to (incorrectly) conclude that SEPTA received its entire investment back upon its sale of WFMBS 2007-13 Certificates. To be clear, as shown in SEPTA's Supplemental Certification, which is attached as Exhibit A to the Declaration of Matthew P. Jubenville In Support Of Plaintiffs' Opposition To Defendants' Motions To Dismiss, when SEPTA sold the Certificates in May 2009, it received only $35,545 in proceeds, far less than the remaining $122,252 face value. SEPTA, therefore, incurred losses and Defendants' motion to dismiss as to WFMBS 2007-13 should be denied.

B. Defendants' Contentions Against The Sustained Claims Are Still Not Grounds For Dismissal

"To state a claim under Section 11, a plaintiff must plead: (1) that the registration statement at issue contained a misstatement or omission; and (2) that the misstatement or omission was material." April 22 Order, 2010 U.S. Dist. LEXIS 39825, at *34-35 (citing *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994)). It is well-established that Sections 11 and 12(a)(2) are strict liability claims and do not require Plaintiffs to plead scienter. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (stating that Section 11 imposes a "stringent standard of liability," that is "virtually absolute, even for innocent misstatements."); *see also Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (same as to Section 12(a)(2)).

While the Amended Complaint asserts solely claims that the Court previously sustained, Defendants now contend that Plaintiffs must plead facts related to Defendants' knowledge.

Defendants' argument is simply wrong. As discussed below, the Amended Complaint adequately pleads claims under Sections 11 and 12(a)(2) of the Securities Act's strict liability standard by setting forth the untrue statements of material fact and the material information omitted from the Offering Documents.

1. As The Court Previously Found, The Amended Complaint Alleges Untrue Statements And Omissions In The Offering Documents

a. Untrue Statements And Omissions Related To Underwriting Standards

The Court's April 22 Order upheld Plaintiffs' claims of untrue statements relating to Wells Fargo's stated underwriting standards, as well as the standards of other loan originators in the securitized pools, finding that plaintiffs sufficiently alleged that "the Offering Documents were misleading as to the ***extent*** to which Wells Fargo and the third-party originators deviated from their guidelines." 2010 U.S. Dist. LEXIS 39825, at *37-38 (emphasis in original). The Amended Complaint contains allegations that are identical to those that the Court already analyzed and sustained.

Defendants' motion asserts an argument that they could have raised previously, but did not, and that several courts have rejected.[8] Defendants claim that Section 1111(a)(3) of SEC Regulation AB ("Regulation AB") effectively imposes a scienter standard for pleading a violation of the Securities Act for certain loans. Specifically, Defendants contend that because Section 1111(a)(3) states that Defendants must disclose underwriting criteria and "to the extent known, any changes in such criteria" and whether such criteria can be overridden, Plaintiffs must allege that Defendants had knowledge of the other originators' deviations from the stated underwriting guidelines. Wells Mot. at 2. Defendants are wrong.

As an initial matter, Defendants do not – and cannot – contest the falsity of statements relating to Wells Fargo's underwriting guidelines and those of its correspondent lenders. Wells Fargo and its

[8] Defendants' tactics – filing a second motion consisting of numerous arguments available to them at the time of their earlier motion – serve only to unnecessarily delay this litigation. The allegations in the Amended Complaint related to underwriting standards, ratings processes and appraisals are substantively identical to those in the Consolidated Complaint and should not be the subject of successive and piecemeal motions to dismiss.

correspondent lenders originated the vast majority of the mortgage loans in each of the offerings at issue. Indeed, there are only four trusts to which a third-party originator – American Home Mortgage Corporation ("American Home") – contributed loans. ¶¶59, 84, 117. These are the only trusts which Defendants' Regulation AB argument even applies.[9] As to these trusts, "Defendants [continue] to misunderstand the nature of plaintiffs' allegations." April 22 Order, 2010 U.S. Dist. LEXIS 39825, at *37. Plaintiffs' allegations are not premised on undisclosed "changes" in the other originators' (*i.e.*, non-Wells Fargo or correspondent lender) underwriting criteria or the extent to which the other originators' underwriting criteria could be overridden. Rather, Plaintiffs' allegations are based on the systematic "disregard" for the stated (and unchanged) underwriting guidelines. Accordingly, Section 1111(a)(3) simply does not apply here.

Second, Section 11 imposes liability both for untrue statements and omissions. *See* 15 U.S.C. § 77k(a) (liability exists when a registration statement "contained an untrue statement of a material fact ***or*** omitted to state a material fact required to be stated therein ***or*** necessary to make the statements therein not misleading" (emphasis added)). The duty to disclose found in Regulation AB does not absolve defendants of liability for affirmative misstatements. Here, Defendants made affirmative misstatements regarding American Home's underwriting guidelines. The Amended Complaint details how American Home greatly reduced and/or eliminated its underwriting standards in order to approve as many mortgages as possible. Indeed, an e-mail from an American Home Senior Vice President of Product and Sales Support to loan officers nationwide stated that American Home would make a loan to virtually any borrower, regardless of the borrower's ability to verify income, assets or even employment. ¶85.

Numerous courts have recently held that the phrase "to the extent known" does not apply where the claims are based on "affirmative misstatement[s]." *See, e.g., In re Lehman Bros. Sec. & ERISA Litig.*, 684 F. Supp. 2d 485, 493-94 (S.D.N.Y. 2010) ("Lehman MBS") ("Regulation AB requires the truthful disclosure of the 'underwriting criteria used to originate or purchase the pool

[9] American Home originated loans in the Wells Fargo Mortgage Backed Securities 2006-3, 2006-4, 2007-10, 2007-13 Trusts. ¶117. American Home originated no more than 20% of the mortgage loans in any of these trusts.

assets,' and the complaint alleges that the loans were originated using criteria different than those stated in the Offering Documents. As this claim relies on Section 11 of the Securities Act, and not Section 10(b) of the Securities Exchange Act or Rule 10b-5, the Individual Defendants' knowledge is immaterial."); *New Jersey Carpenters Vacation Fund v. The Royal Bank of Scotland Group, PLC*, 2010 WL 1172694, at *11 (S.D.N.Y. Mar. 26, 2010) ("Harborview MBS") (Regulation AB is immaterial because plaintiffs alleged that defendants "affirmatively misstated the guidelines used – or rather, disregarded – by the mortgage originators of the underlying loans"); *New Jersey Carpenters Health Fund v. Residential Capital LLC*, 2010 WL 1257528, at *5 (S.D.N.Y. Mar. 26, 2010) ("RALI MBS") ("Defendants' argument[s] that the information was disclosed and otherwise had no further duty to disclose based on SEC Regulation AB, 17 C.F.R. § 229.1111, are not persuasive for essentially the same reasons laid out in detail in [*Harborview MBS*]").

Defendants ignore these recent on-point decisions and instead rely on two cases that are distinguishable. *See* Wells Mot. at 11 (citing *Landmen Partners Inc. v. Blackstone Group, L.P.*, 659 F. Supp. 2d 532, 545 (S.D.N.Y. 2009), and *Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 614 (S.D.N.Y. 2008)). First, the duty to disclose in Section 1111(a)(3) was not at issue in either *Landmen Partners* or *Garber*. Rather, both cases involved claimed violations of Item 303 of Regulation S-K, which requires the disclosure of any "known trends or uncertainties, etc." Second, both *Landmen Partners* and *Garber* involved alleged omissions, ***not*** affirmative misstatements. *See*, *Harborview MBS*, 2010 WL 1172694, at *11 (distinguishing *Landmen Partners* and *Garber* because they "focused on what the registration statement ***failed to disclose***).

Regulation AB does not apply to false statements about Wells Fargo's underwriting standards or those of its correspondent lenders and also does not alter Section 11 liability for affirmative misstatements in the Offering Documents that loans were originated "in conformity with" other originators' standards. Defendants' contention, therefore, that Plaintiffs must plead Defendants' knowledge should be rejected.

b. Untrue Statements And Omissions Related To Ratings And The Ratings Process

In its April 22 Order, the Court held that Plaintiffs' allegations related to ratings and the ratings process stated a claim:

> [P]laintiffs point to … an SEC Summary Report … [and] statements by executives of defendants Moody's and Standard & Poor's in which the executives admitted that they were aware at the time the subject ratings were made that the agencies' rating models were outdated … ***In the Court's view, these allegations, particularly the statements from Moody's and S&P's executives, are sufficient to establish an actionable misstatement with respect to the rating process.***

2010 U.S. Dist. LEXIS 39825, at *42-43 (emphasis added).

Nevertheless – and despite the well-established precept that Sections 11 and 12(a)(2) do not require Plaintiffs to plead scienter – Defendants contend that ratings are "opinions" and that Plaintiffs must plead that the "opinions" are subjectively false – an assertion that was raised and rejected in the original motion to dismiss. Wells Mot. at 7-8 (relying on *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991), and *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009)).

As an initial matter, Defendants' "subjective falsity standard" never applies to factual statements. *See In re Wash. Mut. Sec. Deriv. & ERISA Litig.*, 694 F. Supp. 2d 1192, 1223-24 (W.D. Wash. 2009) (finding that audit opinion stating that financial statements were presented "in conformity with accounting principles generally accepted in the United States of America" was an actionable statement of fact); *see also In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266 (N.D. Cal. 2000) ("purely factual assertions in the fairness opinion, such as Bear Stearns' statements that it reviewed certain materials during its due diligence inquiry, would be held to a negligence standard"). Here, statements in the Offering Documents that ratings addressed "the likelihood of the receipt … of principal and interest" and "the nature of the underlying mortgage loans" are factual assertions that the Certificates' value and risk had been evaluated, and that the ratings accurately reflected the character of the underlying mortgage pools at the time.[10] These statements bear no resemblance to the "fairness

[10] ¶100. Defendants' contention that the First Amendment compels Plaintiffs to comply with their "subjective falsity" standard is baseless. Wells Mot. at 7 n.7. "[T]here is no automatic, blanket, absolute First Amendment protection for reports from the credit rating agencies …" *In re Enron*

opinions" in *Rubke* and *Virginia Bankshares*, which stated that a particular transaction was within a range of fairness from a financial point of view.

Moreover, even if the ratings were opinions – which they are not – statements of opinion are actionable when (1) the speaker does not genuinely believe the statement; (2) there is no reasonable basis for that belief; or (3) the speaker is aware of undisclosed facts tending to seriously undermine the accuracy of the statement. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113-14 (9th Cir. 1989), *cert. denied sub nom. Schneider v. Apple Computer*, *Inc.*, 496 U.S. 942 (1990). The Amended Complaint amply alleges facts showing that Defendants could not have genuinely or reasonably believed that the ratings, or the statements in the Offering Documents about them, were accurate. For example: (1) as the result of the systemic violations of the underwriting standards, the ratings were based on "inaccurate loan information" related to borrower credit-worthiness, ability to repay, and the sufficiency of the collateral, ¶6; (2) a former managing director at S&P admitted that the models which generated the ratings failed "to capture changes in performance of the new non-prime products," ¶112; (2) a former managing director at Moody's stated that the rating agencies "did not update their models or their thinking," ¶114; (3) Defendants pre-determined the ratings, rather than allowing the ratings to be a product of an evaluation of the underlying loan pools, ¶¶41, 102-03; and (4) the Certificates' value and ratings collapsed shortly after issuance. ¶¶7, 118.

The court in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 176 (S.D.N.Y. 2009), in response to the exact argument that Defendants make here, recently held that ratings were actionable false statements because "plaintiffs have sufficiently pled that the Rating Agencies did not genuinely or reasonably believe that the ratings they assigned…were accurate and had a basis in fact." *Id.* at *37. Here, the Amended Complaint details that neither the rating agencies,

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*Corp. Sec., Deriv. & ERISA Litig.*, 511 F. Supp. 2d 742, 817 (S.D. Tex 2005). In fact, the "actual malice" standard does not apply to ratings because they are only intended for use in offering documents, rather than for general publication. *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1095-97 (S.D.N.Y. 1996). *See also In re Fitch, Inc.*, 330 F.3d 104, 108-10 (2d Cir. 2003) ("Unlike a business newspaper or magazine … Fitch only 'covers' its own clients. We believe this practice weighs against treating Fitch like a journalist."). Here, the rating agencies privately contracted with Defendants to assign the Certificate ratings and took an active role in the offerings. They were clearly not journalists and the ratings are not "opinions" entitled to First Amendment protection.

who admitted that they did not update their models or their thinking, nor the Wells Fargo Defendants, who provided the rating agencies with the inaccurate loan information, had a basis to genuinely or reasonably believe in the accuracy of the ratings.

c. Untrue Statements And Omissions Related To Appraisals and LTV Ratios

The Court's April 22 Order also held that Plaintiffs' allegations related to appraisals/LTV ratios were sufficient to state a claim:

> Plaintiffs' allegations concerning the allegedly improper appraisal practices are ***sufficiently specific to state a claim*** with respect to the securities at issue in this case. In particular, plaintiffs have alleged that Wells Fargo's practices permitted the pervasive and systematic use of inflated appraisals, affecting all types of mortgages. ***Plaintiff need not allege anything further in order to state a claim.***

2010 U.S. Dist. LEXIS 39825, at *40-41 (emphasis added).

Accurate real estate appraisals and the calculated LTV ratios and averages based on those appraisals, were essential to assessment of the price and risk of the offered Certificates. ¶¶45-50. Here, the Offering Documents contained statements that originators evaluated the adequacy of the mortgage property as collateral and that appraisals were conducted in conformity with USPAP. ¶¶88-90. In reality, appraisers industry-wide "experience[d] systemic problems of coercion" and were forced to inflate property valuations in order to avoid the "negative ramifications" that would result if they did not "cooperate, alter their appraisal, and provide a higher valuation." ¶95. According to the testimony of the Chair of the Appraisal Institute before the Senate Committee on Banking (¶94), some appraisers were "ordered to doctor their reports" or else they would never "see work from these parties again" and could be "placed on exclusionary or 'do-not-use' lists." *Id.* Additionally, 90% of appraisers reported that mortgage brokers and others pressured them to raise property valuations to make mortgage deals go through. ¶95.

A former Wells Fargo Home Mortgage underwriter/senior underwriter from January 2002 through April 2006 confirms that representatives constantly pushed the appraisers to inflate the value of the real estate underlying the loans and if the appraisers didn't, "they don't come back to you." ¶93. In addition, a former underwriter from July 2005 through December 2006 explained that appraisals at

Wells Fargo Home Mortgage were "very inflated" and that retail officers "always managed to get the value they wanted." ¶97. Indeed, Wells Fargo and RELS Valuation (an appraisal entity jointly owned by an affiliate of Wells Fargo Bank) are the subject of investigation and litigation over the illegal practice of pressuring and intimidating appraisers into using techniques that produce appraisals meeting Wells Fargo's objectives even when the use of such techniques is improper and violates industry standards. ¶96.

In response to these damaging allegations, Defendants attempt to raise an argument they could have raised in their prior motion, but did not. In particular, Defendants now claim that each appraisal was an opinion and, therefore, Plaintiffs must plead that the speaker did not truly have the "opinion." Wells Mot. at 7 (citing *Virginia Bankshares*, 501 U.S. at 1095-96, and *Rubke*, 551 F.3d at 1162). Defendants continue to misunderstand the nature of Plaintiffs' allegations. Plaintiffs allege that the Offering Documents' statements that appraisals were generally conducted in conformity with USPAP were untrue and omitted material information because, in truth, the appraisals were generally not performed in conformity with USPAP, were not performed by truly "independent" appraisers, or both. *Id.* As a result of this failure to follow stated guidelines, LTV ratios and other values derivative of appraisal value were misstated.

Even assuming, *arguendo*, that appraisals are opinions and Plaintiffs are challenging each individual appraisal – which they are not – the allegations in the Amended Complaint are sufficient to allege actionable untrue statements and omissions. For example, the Amended Complaint details that appraisers and individuals at Wells Fargo were aware of "do-not-use" lists and pressured appraisers to "cooperate, alter their appraisal, and provide a higher valuation." ¶¶94-95. These undisclosed facts "tend[] to seriously undermine the accuracy of the statement[s]" in the Offering Documents that appraisals were conducted in accordance with USPAP and originations were conducted to evaluate the adequacy of the property as collateral. *See Apple Computer*, 886 F.2d 1109 at 1113-14. The allegations in the Amended Complaint – which are identical to those this Court already sustained – adequately allege actionable misstatements related to appraisals and LTV ratios.

2. Defendants Still Have Not Met Their Heavy Burden For The Statute Of Limitations Defense

The statute of limitations for Sections 11, 12(a)(2) and 15 claims is "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. The Supreme Court, when dealing with a similar statute contained in the Securities Exchange Act of 1934, recently explained what is required to put a plaintiff on inquiry notice:

> We conclude that the limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation" – whichever comes first. In determining the time at which the "discovery" of those "facts" occurred, terms such as "inquiry notice" and "storm warnings" may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. ***But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation,"***

*Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1798 (U.S. 2010) (emphasis added). Previously, this Court found Defendants' statute of limitations defense "unpersuasive," and *Merck* raises the standard which Defendants would have to meet. A court deciding defendants' motions to dismiss in a recent mortgage-backed securities case explained:

> *Merck*, if anything, favors the plaintiffs here. Indeed, in *Merck*, the Court rejected arguments of the defendants quite similar to the arguments made by defendants here and held, in effect, that even if a plaintiff had 'inquiry notice' sufficient to warrant beginning to investigate, a plaintiff would not be barred by the statute of limitations unless a reasonably diligent plaintiff similarly situated would have actually discovered the facts showing the violations alleged in the plaintiff's complaint.

*Merrill MBS*, 2010 WL 2175875, at *2.

As this Court correctly held, the statute of limitations defense is fact-intensive and is generally not appropriate for consideration at the pleading stage. April 22 Order, 2010 U.S. Dist. LEXIS 39825, at **23, 26-27. Nevertheless, Defendants again contend that their wrongdoing was so obvious and their statements were so clearly false that Plaintiffs should have commenced suit much sooner.

First, Defendants' assertions that Plaintiffs carry the burden is legally incorrect. In the Ninth Circuit, "***the defendant bears a considerable burden*** … that the plaintiff's claim is time barred." *Betz*

*v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, 877 (9th Cir. 2008) (emphasis added). The Ninth Circuit's finding in *Betz* was in the context of a summary judgment motion in a Section 10(b) case, and "[t]he burden must be at least as high on the pleadings." *See In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 557 (N.D. Cal. 2009) (applying *Betz* and declining to find that Section 11 claims were untimely as a matter of law).

Defendants assert that Plaintiffs must plead additional details related to the circumstances of their discovery and facts demonstrating their diligence. Wells Mot. at 9-10. In support, Defendants ignore *Betz* and instead rely heavily on *Toombs v. Leone*, 777 F.2d 465 (9th Cir. 1985), and other cases decided long before the Ninth Circuit's decision in *Betz* and the Supreme Court's decision in *Merck*.[11] The Ninth Circuit and others, however, have criticized *Toombs*, stating that it "has incurred forceful, and we think justified, criticism." *Johnson v. Aljian*, 490 F.3d 778, 782 n.13 (9th Cir. 2007). *See also Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 719 (7th Cir. 1993) ("[t]o the extent that the rule [in *Toombs*] has persisted, it has done so by blind inertia" and that "[i]t is time that it was discarded"). The *Aljian* court noted that a rule like that announced in *Toombs* is inappropriate as the statute of limitations improperly "becomes transformed as an element of [the] claim." *Id.* (finding that plaintiffs need not plead the statute of limitations as an element of a Section 10(b) claim).

Second, Defendants are factually wrong. The Amended Complaint alleges: (1) the date when Plaintiffs were first plausibly on notice; (2) the reason that date is significant; (3) and that despite the exercise of reasonable diligence, they could not have discovered their claims at an earlier time. ¶¶104, 136, 145. Specifically, the Certificates maintained their investment-grade rating until at the earliest May 20, 2008, when Certificates that were initially rated "A" or higher were first downgraded below investment-grade. ¶104. Accordingly, no "sufficient suspicion" of a Securities Act claim on behalf of Wells Fargo investors reasonably existed prior to May 20, 2008. *Betz*, 519 F.3d at 876; *Charles*

[11] Defendants also rely heavily on *Toombs'* progeny. *See, e.g.*, *In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1106, 1115 (C.D. Cal. 2003) (applying *Toombs* even though "Plaintiffs fail to address this argument"); *Erickson v. Kiddie*, 1986 WL 544, at *7 (N.D. Cal. Feb. 24, 1986) (erroneously applying fraud standard to § 12(2) claim, stating plaintiffs "failed to allege the reasons for not discovering the alleged *fraud* and the efforts they have made to discover it") (emphasis added). As with *Toombs*, these district court decisions were decided well before *Betz* and *Charles Schwab*.

*Schwab.*, 257 F.R.D. at 556. The initial action was timely filed on March 27, 2009 – well within one year of the May 20, 2008 downgrades.

In addition to the Court's April 22 Order, several courts have rejected arguments identical to Defendants' contention here. *See, e.g., Harborview MBS*, 2010 WL 1172694, at *9 ("Plaintiffs point out that they could not have known that the originators' disregard for underwriting guidelines specifically included the underwriting of the loans used for the Harborview Trusts until the Certificates were downgraded by the rating agencies after May 14, 2007"); *Merrill MBS*, 2010 WL 2175875, at *2; *IndyMac MBS*, 2010 WL 2473243, at *5 ("the Court cannot conclude as a matter of law that the publicly available information was sufficiently specific to put the plaintiffs on actual or inquiry notice that a cause of action was probable.").

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Defendants' motions should be denied and that Defendants be ordered to answer the Amended Complaint within 20 days. In the event the Court decides to dismiss all or part of Plaintiffs' allegations, Plaintiffs respectfully request leave to replead. Fed. R. Civ. P. 15(a) sets forth a policy in favor of granting leave to amend, stating that leave shall be freely given when justice so requires. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th. Cir. 2003) (dismissal with prejudice and without leave to amend is not appropriate unless it is clear "that the complaint could not be saved by amendment.").

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